EXHIBIT B

Transcript of March 24, 2017 Hearing in *Abbey Dental Center v. Consumer Opinion, LLC*

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE PEGGY A. LEEN, MAGISTRATE JUDGE

ABBEY DENTAL CENTER, Plaintiff, vs. CONSUMER OPINION LLC, Defendant.	No. 2:15-cv-02069-GMN-PAL

TRANSCRIPT OF MOTION HEARING

March 24, 2017

Las Vegas, Nevada

FTR No. 3B/20170324 @ 9:03 a.m.

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(Proceedings recorded by electronic sound recording, transcript produced by mechanical stenography and computer.)

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LAS VEGAS, NEVADA, MARCH 24, 2017, 9:03 A.M.

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P R O C E E D I N G S

COURTROOM ADMINISTRATOR: All rise.

THE COURT: Good morning. Please be seated.

COURTROOM ADMINISTRATOR: Your Honor, we are now calling the motion hearing in the matter of Abbey Dental Center versus Consumer Opinion, LLC. The case number is 2:15-cv-2069-GMN-PAL.

Beginning with plaintiff's counsel, counsel, please state your names for the record.

MR. AMIN: Good morning, Your Honor. Ismail Amin on behalf of plaintiff.

MR. RANDAZZA: Good morning, Your Honor. Marc J. Randazza and Alex Shepard on behalf of the defense.

THE COURT: All right. This is on calendar on the defendant's motion to stay the case until a ruling on the motion to dismiss that raises the Anti-SLAPP provisions of NRS 41.660.

Both sides agree to the legal standard the Court is supposed to apply and that the discovery stay and provisions of the Nevada statute are not binding on this Court and in fact should not be applied if inconsistent with or colliding with the Federal Rules of Civil

Procedure.

So I have read your moving and responsive papers. But this is your opportunity to be heard.

Mr. Randazza.

MR. RANDAZZA: Thank you, Your Honor. May I approach?

THE COURT: Please.

MR. RANDAZZA: May it please the Court.

Your Honor, correct, I wish that I could rely upon 41.660's mandatory stay of the case as if we were in state court. I can see that argued frequently in federal court, and I wistfully say if only it were so.

Therefore, I must simply ask that this Court apply Rules 116 and 37 in order to give effect to the Anti-SLAPP statute. And --

THE COURT: And what about Rule 56(d)?

MR. RANDAZZA: Yes, Your Honor. I'm -- if we'd like to jump right to that --

THE COURT: That's quite all right. Go ahead. I don't mean to interfere with your argument.

But the real question I have is whether or not Rule 56(d) collides with a stay in this circumstance of which the opposition to the motion for summary judgment articulates, with some specificity, what discovery is necessary according to the plaintiffs in order to decide

the summary judgment motion on the merits.

MR. RANDAZZA: Okay. I do agree that 56(d) should be -- if 56(d) is invoked properly and the standards are met, I believe that a Rule 56(d) motion would function the same as a 41.660(4) motion in state court to allow specific targeted discovery.

However, the standard that has to be met there, I don't think we're -- I don't think we're even close. There is the mention of Rule 56(d). I believe it must be made by separate motion.

But even if we are to excuse that, it must set forth the specific facts it hopes to elicit from further discovery.

We don't have that. We simply have nebulous discussions of we need more discovery on certain issues. It must show that those facts sought -- exist and show that the sought after facts are essential to oppose summary judgment.

Now, what we see in this opposition -- and the place to raise 56(d) is properly in an opposition to a motion for summary judgment.

And what they should have done, if they want to invoke that, is say: We simply cannot oppose that at this time because we need this discovery in order to do so.

Nevertheless, in their opposition they do state,

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ECF 37 at page 17: We don't need any further discovery because the *Sleekcraft* -- excuse me, the *Sleekcraft* factors favor us.

I think this is one place where we have as a matter of law fundamental disagreement. The *Sleekcraft* factors do not apply when you have a nominative fair use case like this one.

So what they're asking for is all kinds of discovery on that, including, if I'm not mistaken, a very generous helping of expert witness testimony.

Now, this case was filed, I believe, 14 months ago, maybe even longer. If they need expert reports, they have had more than a year to prepare them. If they need expert studies, they need surveys, they need statisticians, that isn't a discovery issue. They don't need that from us, they need that on their own.

And if they have not yet produced that, they have not yet created that, I don't see why that becomes the defendant's problem in an Anti-SLAPP case.

Now, they also ask for -- or at least mentions, without meeting these three standards, that they want factors for nominative fair use; but they don't explain any facts that Abbey means to oppose the motion for summary judgment, why it hasn't gotten them from third parties, and those factors can be resolved on the current record.

To claim that likelihood of confusion factors are relative to nominative fair use is simply incorrect.

And the use here that they're complaining about under the Lanham Act is we have a consumer review website.

Now, if you were to have a consumer review of a company without mentioning the name of that company, that would be a very ineffective consumer review. It would simply be: We know of this dental clinic in Henderson that we don't like, but we can't tell you what it is because it might infringe on their trademark.

And I don't mean to be irreverent in trying to say that, but I don't know how else to wrap my head around it.

And as this very court, Judge Leen said in Newmont versus Little Busy (phonetic) -- I'm sorry, I don't -- I haven't got that citation memorized, but she stated very clearly how important consumer reviews are.

Could you imagine that any consumer reviewed product or company would simply say it's likely to confuse consumers, if they look at this website, they're going to think it comes from us? It's simply an absurd argument.

We now look at nominative fair use. Do we need to mention the name of a product in order to review it? I think that goes without citation or saying that we need to.

There are other -- the other factors that he

said while invoking 56(d) without meeting the standards, it doesn't explain, for example, how a reviewed company's name in a URL affects nominative fair use.

Now, this was a claim that they added to their amended complaint for cybersquatting under 15 U.S.C. 1125(d). That is very easily dispensed of as a matter of law because despite the fact that I -- I actually personally like my friend's argument that I believe that subdomains should have been covered under the Anti-SLAPP statute. I fully agree with that as a gentlemanly matter.

However, I have, unfortunately, had that argument thrown away against me because the legislative history of the statute and the statute itself in interpreting decisions have all said that subdomains are very clearly not covered under 1125(d).

I don't know why Congress debated that very specific issue. It was a very -- perhaps it was because of how early in the development of the Internet that they were passing the cybersquatting act. Perhaps had they an opportunity to amend it today, they might change that fact because it would be very easy to circumvent the cybersquatting laws in order to do that.

But unfortunately we are stuck with not what I wish the law was and not what he wishes the law was but what the law is. And we discussed that, I think,

thoroughly but briefly in our Anti-SLAPP motion simply because there isn't a complicated discussion about that.

So the next 56(d) or purported 56(d) discovery they want, like I said, is consumer surveys. I don't see how a consumer survey relates to any nominative fair use factor. They have not explained how those facts exist, how it is essential to oppose summary judgment, or what specific facts they want. They simply want to conduct consumer surveys.

Well, they're free to do that. And they have been free to do that for the past 14 months. And I don't have those consumer surveys. I mean, my client doesn't have those consumer surveys. My client can't be compelled to conduct them. So what is it that they're really asking for?

They also wish to -- they say they need to retain a statistician to perform, and I quote, "Technical analysis of the degree and extent of the defendant's use of the plaintiff's trademark via domain use."

Again, this doesn't explain how this relates to any factor that they need in order to oppose. It doesn't explain any of these three factors that you need under 56(d).

And, again, what's -- nothing is stopping them at this point, and nothing has been in their way for the

past 14 months.

They have also stated that they need documents from us, and they have stated in their moving papers that we have provided none.

We have shown in the record that we have provided hundreds of pages of documents. And in fact in order to ensure that there was no question about that, we've placed them all in the record at ECF 35-20 and ECF 35-21.

The responses with objections are ECF 35-22 and 34-4.

Now they say that they are insufficient, but they haven't explained how or filed a motion to compel nor even met and conferred with us on a motion to compel.

As far as presenting a 30(b)(6) witness for deposition, we did this. We offered Mr. Podolsky as the witness starting in late December. We scheduled his deposition. Mr. Podolsky made travel arrangements. He was on his way.

And then on the Saturday before the deposition, they unilaterally cancelled the deposition despite our insistence that it go forward. Not that we believe that anything in that deposition would be relevant under the Rule 56(d) factors.

However, we did not wish to appear

uncooperative. We did not wish to have -- to give them any additional arguments that this case should be -- continue to be aggressively litigated in the face of an Anti-SLAPP motion, ergo we offered him.

They decided at the last minute -- now, they have said it is because it was due to settlement discussions ongoing. I do not wish to violate Rule 408, but I will tell you that that is not the reason that this was cancelled. And my client continued to insist that it go forward.

So what we really have here now is a request that you take into account while I do not -- I cannot claim that the Anti-SLAPP statute compels the result, I ask that Your Honor look to the rules that we have before us: Rule 1 that says that cases should be dealt with efficiently; Rule 16 gives you the authority, of course; Rule 37 as amended, and I think wisely, that discovery should be proportional to the needs of the case.

We had a fully briefed, fully backed up Anti-SLAPP motion which they attempted to defeat with an amended complaint.

We then promptly filed a new one, which now they wish to extend through additional very nebulous discovery.

And if they wanted to oppose the Anti-SLAPP motion/motion for summary judgment on the grounds that we

cannot properly oppose this without these specific things meeting those three factors under 56(d), that would have been proper.

Even at this point if they wish to file a 56(d) motion stating with specificity that way, not simply laying out, you know, we need to drag the net as wide as we can in order to make this case even more expensive.

My client is a well-known website, but surprisingly a small company that cannot very well afford to be dragged through this with months of discovery.

Now, I wish also for something that I think -- I regret that we didn't put in our papers, but I don't think anybody is going to object to me raising it now, is that, if I'm not mistaken, if my math's not off, we have 68 days left in discovery in this case as it stands.

In the event Your Honor does grant our motion and in 10 days Judge Navarro decides the motion against us, I don't wish for them to lose those 10 days. Now, we can say on the record now that we will stipulate to extending those 10 days if this Court is willing to allow the parties to do that.

If this case takes -- if Judge Navarro does not have the opportunity to do this until next November, we're okay with that. We would just simply say that if it's denied, then we would have full run for 68 more days.

What I am trying to do in this case is resolve it efficiently. And given that we believe, quite firmly, that the Anti-SLAPP motion will be resolved in our favor, I think this does not only benefit the defendant in the case, as would be obvious, but if we do prevail, this is a case where there are mandatory attorney's fees; therefore, I would like to file a request for as few fees as possible, not as many as possible.

So if they have absolutely no fear of losing the motion, then I suppose that their logic in opposing our position here makes sense.

But if there is the possibility that they are going to lose the motion, I think it would benefit them as well to let the impact of that loss be as minimal as possible.

THE COURT: Thank you.

Mr. Amin?

MR. RANDAZZA: Thank you, Your Honor.

MR. AMIN: Thank you, Your Honor. Good morning.

Without belaboring the oppositions that have been filed to the motion for summary judgment and the motion to dismiss, just highlighting some of the reasons why discovery should be permitted to move forward, I think the Court was correct and articulated it well as it relates to the *Rogers v. Home Shopping Network* case and the

colliding aspects of Rule 56(d) and the Anti-SLAPP statute.

THE COURT: So the question is did you comply with Rule 56(d) in opposing the motion for summary judgment?

MR. AMIN: Respectfully, Your Honor, we believe we did.

And paragraph 51 of my declaration sets forth some very specific --

THE COURT: Paragraph 51 of the opposition to the motion for summary judgment?

MR. AMIN: Yes, Your Honor. It's actually paragraph 51 of my declaration in support of the oppositions to both motions.

And it set forth very specific requests that we needed to have satisfied. And mind you that those requests address both the *Sleekcraft* factors and the *New Kids on the Block* factor, which -- factors, which relate to nominative fair use.

There's another procedural problem with plaintiff's -- excuse me, defense -- defendant's argument.

Assuming the Anti-SLAPP motion is granted in its entirety, there still remains three claims that are subject to disposition, vis-à-vis the motion for summary judgment.

Those three claims clearly -- there is no discovery stay mechanism afforded outside of Your Honor's

ruling or order. And those three claims are federal trademark infringement, false designation of origin, and cybersquatting. Those were not addressed in the Anti-SLAPP motion.

Now, cutting to the comments made by counsel this morning, we disagree that this is a case about nominative fair use. We believe this is a likelihood of confusion case.

We believe that the appropriate standard --

THE COURT: It's confusing to list your client as the entity that the consumer review site is reviewing?

MR. AMIN: Your Honor, assuming it is a consumer review site. Assuming it's a consumer review site, it's not only the source or the way the advertising occurred, it's how the advertising occurred.

And in this particular case you have a trademark that shows up as the very first literal element on a domain. So it will say Abbey Dental/thisconsumer.com. There have been multiple variations of that.

Effectively what this does is it redirects consumers to their website. That is not protected speech. That is not defamation. It's not subject to the Anti-SLAPP statute or the scheme of that statute.

And even assuming that nominative fair use is at issue, that in and of itself requires factual discovery.

There -- you can't simply say, oh, well, we're a consumer based website that simply operates to allow consumers to post opinions.

Without getting into why this particular website has a legitimacy verification program, has a business solutions program, makes significant revenues from advertising dollars, invites businesses to participate in these programs for fees, exorbitant fees -- and the process is opaque. We've documented it, I think, fairly well in our oppositions.

So to say this is a nominative fair use case is frankly disingenuous. And there is a lot of discovery that should happen in that regard.

And one of the specific factors -- and it's the *New Kids on the Block* case that discusses the defense of nominative fair use. One of the specific factors, Your Honor, is, well, did the defendant only use as much of the mark as reasonably necessary? Did the defendant cross the line in using the mark?

We believe this is a case where the defendant did cross the line. We believe that those three *New Kids on the Block* factors require discovery, and a minimal amount of discovery at the very least.

And given the fact that the *TradeBay* case imposes the burden upon the moving party, we don't believe

that burden has been met.

I won't comment on the issues surrounding the deposition other than what's in my declaration. I take my oath to this Court and the penalty of perjury very seriously. And I will defer to that.

And insofar as the documents that were filed, discovery responses that were filed by the defense, I will represent to the Court, as set forth in my declaration, those were never received by my office until they were actually filed.

And frankly, I -- I double checked myself three times yesterday, and I did not see them in our files.

And having said that, Your Honor, I would submit on the papers.

THE COURT: Thank you.

MR. AMIN: Thank you.

THE COURT: Briefly in rebuttal, Mr. Randazza.

MR. RANDAZZA: Yes. Your Honor, I'll simply address the question of discovery required for the meeting the *New Kids on the Block* factor. It seems the only factor here is did the defendant use too much of the mark.

I don't know what discovery they're going to ask us for that would provide that. That is a matter of law, I believe, for the Court to decide.

As far as these claims that we are not really a

consumer review website, that is, I think, something that can also be decided as a matter of law. And if not, perhaps my client -- this is not the first time my client has been sued under these precise theories.

There was a case in the Southern District of New York, *Ascentive versus Opinion Corp.*, and one in the Middle District of Florida, *Roca Labs versus Opinion Corp.*, where both of those courts found that we were. So nothing has changed since then.

Again, I don't know what -- even if my client's website was something else, I don't know what it is they say that it is, that doesn't make any difference. What makes a difference is, what's in the record here, is we see a list of consumer reviews. Even if every other subpage on my client's website, if we can use our imagination, think of it as anything else, these are consumer reviews.

So I don't see what discovery is going to be taken that would change that.

And, here again, we have had an opportunity to hear from Mr. Amin. He could have argued even today: Here's the fact we need. It exists. Here how we're going to get it. Here's how it's going to change the outcome.

We still haven't heard those. And we have tried mightily to get those from them. In fact, we did so informally through a series of letters. Even, I think, on

our fourth or fifth attempt to elicit that, we provided an example from a case where it was successful, said: Just follow this, and we will informally provide you with anything that you can articulate.

We are still left here with, in the face of a motion for summary judgment motion/Anti-SLAPP motion, the real only argument is we need more discovery on these issues, which are matters of law with no specificity as required under 56(d).

Thank you, Your Honor.

THE COURT: I am going to grant the motion to stay in this case. I'm not persuaded that the opposition to the motion for summary judgment complied with the specificity and the particularity requirements of Rule 56(d).

But, more importantly, applying the goal of Rule 1 in this case, it seems that there are some very serious detailed issues as a matter of law that can and should be decided before the parties go out and engage in broad discovery in this case, and that it would inure to the benefit of both sides to delay discovery until you get the district judge's decision and order on the motion for summary judgment in this case.

If she agrees with you, Mr. Amin, that discovery is needed, you're going to get the opportunity to conduct

the discovery.

If she disagrees with you that the discovery is needed in order to decide matters -- some of the issues as a matter of law, then you will have engaged in the discovery for naught. And that is not efficient.

Since the late 1970s, the Supreme Court and the drafters of the Federal Rules of Civil Procedure and advisory committee have been urging federal courts to take a more proactive case management to rein in unnecessary discovery to accomplish the goal of Rule 1.

At the end of 2015 the chief justice devoted his year-end statement on the judiciary almost entirely on the need to rein in expensive discovery, urging the lower courts to do that and to proactively manage cases to accomplish the goal of Rule 1 and to avoid unnecessary and expensive discovery which is increasingly precluding ordinary people from being able to have their cases heard in federal court.

At any given time between 40 and 50 percent of our civil cases involve an unrepresented party because parties simply can't afford it.

And so in this case where you have a pending motion which will, if not be dispositive of the case, at least pare down significant issues or give you guidance from the district judge and where the district judge will

decide whether or not you're entitled to any discovery at all if you complied with your Rule 56(d) obligations, that will be decided by her and not me, it makes no sense to engage in expansive discovery at this point, particularly, as Mr. Randazza points out, that much of the generically described discovery that you say you need can be obtained not from the defendant but by your own efforts; for example, your statistician.

Certainly you're not precluded from -- you could have done that before suit. You don't need discovery in order to retain your own expert or consultant.

So I am going to grant it for the reasons I've stated.

And I thank you for the professionalism in which you presented your respective opinions and arguments. Thank you.

MR. RANDAZZA: Thank you, Your Honor.

MR. AMIN: Thank you, Your Honor.

COURTROOM ADMINISTRATOR: All rise.

(The proceedings concluded at 9:29 a.m.)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Donna Davidson 4/20/17

Donna Davidson Date